STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: February 12, 2021]

NORTH AMERICAN CATHOLIC EDUCATIONAL PROGRAMMING FOUNDATION, INC.	:	
v.	:	**C.A. No. PC-2019-11876**
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT FOR THE STATE OF RHODE ISLAND, JANET COIT, in her capacity as Director and DAVID KERNS, in his capacity as a hearing officer for the Department of Environmental Management	:	

DECISION

VOGEL, J. Plaintiff, North American Catholic Educational Programming Foundation, Inc. (North American) appeals a decision and order (Decision) issued by the Administrative Adjudication Division (AAD) of the Department of Environmental Management (DEM). In the Decision, dated December 4, 2019, the hearing officer upheld the terms of a Notice of Violation (NOV) which charged North American with violating the Freshwater Wetlands Act (Act) and its applicable rules and regulations. This Court exercises jurisdiction over this appeal pursuant to G.L. 1956 § 45-24-69. For the reasons set forth herein, the Court grants the appeal in part and denies it in part. Specifically, the Court upholds the finding that North American violated the Act but modifies the Decision as to the restoration order and reverses and remands the penalty order back to DEM to be reassessed consistent with this Decision.

I

Facts & Travel

This case involves the unfortunate and likely unnecessary collision of two noble missions, providing food for the hungry and preserving the purity and integrity of freshwater wetlands. North American, a non-profit corporation, purchased approximately 150 acres of land in the Town of Scituate in 2013 to grow produce to give to churches, soup kitchens, dispensaries and pantries. (AAD Hr'g Tr. 17, 135, 136, Apr. 23, 2019.) The property included a substantial area of freshwater wetlands, much of which North American altered without first obtaining a permit to do so from DEM. Ultimately, DEM ordered North American to cease and desist making further alterations to the wetlands, to restore the wetlands and to pay a $50,000 penalty.

North American's initial contacts with DEM pertinent to this case began on September 3, 2014 when North American applied to DEM to alter the freshwater wetlands on the southernmost portion of the property. The application included a plan that referenced the extensive wetlands located on the property. (Joint Ex. 1, Stipulations ¶ 3; AAD Hearing.) On November 6, 2014, DEM issued an Insignificant Alteration Permit which authorized North American to alter certain wetlands in the southeasternmost portion of the property. *Id*. ¶ 4.

In 2016, North American obtained a "farmer" designation from the United States Department of Agriculture (USDA) and began to farm the wetlands beyond the area covered by the 2014 DEM permit. (Hearing before Justice Vogel (Court Hearing) Tr. at 9, Dec. 1, 2020.) North American did not apply for additional alteration permits, and although it had obtained farmer designation from USDA, it did not receive a similar designation from DEM.

On July 26, 2017 and September 26, 2017, DEM Program Supervisor Charles A. Horbert inspected the property. He observed alterations of the wetlands which were outside the scope of

the permit. (Joint Ex. 1, Stipulations ¶ 5; AAD Hearing). Thereafter, on September 26, 2017, Shawna B. Smith, a Senior Environmental Scientist with DEM's Division of Compliance & Inspection, inspected the property. Ms. Smith issued a "Complaint Inspection Report." *Id.*; (DEM's Ex. 4(a); AAD Hearing.

At an unspecified time after the September 26, 2017 inspection, North American applied to DEM for a "farmer" designation. Landowners with a "farmer" designation may engage in certain insignificant alterations to the wetlands, otherwise prohibited without a permit. G.L. 1956 § 2-1-22(4)(j) defines a "farmer" as "an individual, partnership, or corporation who operates a farm and has filed a 1040F U.S. Internal Revenue Form with the Internal Revenue Service, has a state farm tax number, and has earned ten thousand dollars ($10,000) gross income on farm products in each of the preceding four (4) years." Section 2-1-22(4)(j).[1] North American would not have qualified for this designation until it met such statutory requirements, apparently after November 14, 2017. North American's application included documentation for farming production from July 2014 to November 14, 2017 (AAD Hr'g Tr. 64, 66.)

In January 2018, DEM granted North American the "farmer" designation. With this designation, North American became entitled to engage in:

> "(1) Normal farming and ranching activities [include] . . . plowing, seeding, cultivating, land clearing for routine agriculture purposes, harvesting of agricultural products, pumping of existing farm ponds for agricultural purposes, upland soil and water conservation practices, and maintenance of existing farm drainage structures, existing farm ponds and existing farm roads are permissible at the discretion of farmers in accordance with best farm management practices which assure that the adverse effects to the flow and circulation patterns and chemical and biological characteristics of

[1] Applicants for a "farmer" designation who donate their produce rather than sell it can meet the income requirements by demonstrating that they are producing farm products that if sold would realize $10,000 income. (AAD Hr'g Tr. 63.)

> freshwater wetlands are minimized and that any adverse effects on the aquatic environment are minimized." Section 2-1-22(i)(1).

North American has continuously held the "farmer" designation since receiving it in January 2018. (Decision at 14.)

On July 11, 2018, the DEM Office of Compliance & Inspection issued its NOV arising from the findings from the July 26, 2017 and September 26, 2017 inspections. In the NOV, DEM concluded that North American committed violations in:

> "(a) Clearing, grubbing, stumping, filling . . . , grading, and soil disturbances within a Swamp, Streams, Perimeter Wetlands and Riverbank Wetlands associated with the construction of a road. . . . ;
> "(b) Clearing, grubbing, stumping, filling . . ., grading, excavating and soil disturbances within Swamp associated with the construction of a second road. . . . ;
> "(c) Ditching, diverting, filling . . . and soil disturbances within a River (Rush Brook). . . . ;
> "(d) Clearing, grubbing, stumping, filling . . . , grading, and soil disturbances within Swamp. . . .;
> "(e) Clearing, grubbing, stumping, filling . . . , grading, and soil disturbances within Riverbank Wetlands and Perimeter Wetlands." NOV at 2, July 11, 2018.

DEM specifically found that North American violated:

> 1. "**R.I. Gen. Laws Section 2-1-21** – prohibiting activities which may alter freshwater wetlands without a permit from the DEM.
> 2. **DEM's Freshwater Wetland Regulations, Rule 5.01** – prohibiting activities which may alter freshwater wetlands without a permit from DEM." *Id.* at 3.

DEM ordered North American to cease and desist from further alterations of freshwater wetlands and to restore all of the wetlands it altered other than those covered under the 2014 permit. NOV. *Id.* at 3-7. Additionally, DEM assessed a $50,000 penalty against North American. This penalty was punitive, in that it was "not [assessed as] compensation for actual pecuniary loss." *Id.* at 7.

North American exercised its right to an administrative hearing challenging the NOV. That hearing was conducted on April 23, 2019 before David Kerins, DEM Chief Hearing Officer (AAD Hr'g Tr.) At the hearing, DEM presented testimony from Ms. Smith who described what she had observed when she inspected the property on September 26, 2017. *Id*. at 6. Her responsibilities as Senior Environmental Scientist include responding to complex wetlands complaints, conducting site inspections to determine the presence of wetlands, evaluating unauthorized alterations to wetlands, preparing reports, evaluating the impact of violations and making recommendations to her supervisors. *Id.* at 6-8. The hearing officer accepted her as an "expert in environmental inspections and interpretation of aerial photographs." *Id.* at 13-15.

Ms. Smith testified that on September 26, 2017, she spent at least three hours inspecting the property. (*Id.* at 18-19.) She met with John Primeau, the president of North American, who remained on the property for about thirty minutes while she inspected it. *Id*. at 18, 19, 135.

Ms. Smith described the violations as "[v]ery extensive, the biggest area of disturbances of any case that [she] worked on." *Id.* at 19. She found "wetland violations in swamp, several unauthorized stream crossings, unauthorized work in a river, clearing and stumping in 50-foot perimeter wetland and 100-foot riverbank wetland." *Id.* She concluded that "[t]here was [sic] large areas of disturbance over the site." *Id.* Ms. Smith summarized her findings in a report and a sketch (DEM's Exs. 4(a), 4(b).) She used the exhibits to distinguish the areas covered by the 2014 Insignificant Alteration Permit from the unauthorized alterations to wetlands referred to in the NOV. She testified that the applicable statute and regulation 5.01 prohibit activities which may alter freshwater wetlands in the absence of a permit from DEM. No permit was issued in this case. (AAD Hr'g Tr. 46, 47.)

She testified that North American had violated the Act when it constructed two roads on the property without obtaining a permit to do so. *Id.* at 33-35. On cross-examination, counsel for North American challenged Ms. Smith's contention that his client had constructed new roads rather than merely expanding existing roadways. Ms. Smith disagreed and described the previous areas as a cart path or a trail, not roadways. *Id*. at 51.

DEM next offered testimony from Howard Cook, the Principal Environmental Scientist with DEM's Division of Agriculture. Mr. Cook's responsibilities include "overseeing agricultural wetlands and agricultural farmer qualification process[.]" *Id.* at 59. He testified that North American applied for "farmer" designation by providing the necessary Farming Production Benefaction Receipts covering four calendar years: 2014, 2015, 2016 and 2017. DEM did not approve North American's "farmer" designation until 2018. *Id.* at 66, 67.

Mr. Cook testified that landowners without this designation must apply to DEM for a permit before altering wetlands. *Id.* at 69. Obtaining a farm tract number from the USDA would not exempt a landowner from this requirement nor would it serve as a substitute for a "farmer" designation by DEM. *Id.* at 68.

Mr. Cook testified that those who have a "farmer" designation may alter wetlands without obtaining a permit to conduct "normal farming/ranching activities." This exemption from applying for a permit would not include the right to construct a road. *Id.* at 71. Mr. Cook stated that if the road project was insignificant, his department, the Division of Agriculture, would have the authority to issue a permit. Otherwise, his office would work with the "farmer" to redesign the project, if possible. If not, the "farmer" would be referred to the Office of Water Resources to seek a permit. *Id.* at 72, 73.

Based upon his review of the exhibits prepared by Ms. Smith and referenced during her testimony, Mr. Cook opined that a landowner with the "farmer" designation would require a permit for many of the alterations made by North American. *Id.* at 74-78 (DEM's Ex. 4(b)). He also testified that the "farmer" designation does not apply retroactively. *Id*. at 67.

DEM presented a second witness, Kenneth D. Ayars, to address the rights of a landowner who has obtained the "farmer" designation to alter the wetlands without obtaining a permit and the limits to that permit exemption. Mr. Ayars has served as the Chief of the Division of Agriculture for 32 years and holds advance degrees in Zoology and Agriculture. He has qualified as an expert in various court cases, and the hearing officer permitted him to testify as an expert. *Id.* at 114-116.

Mr. Ayars testified that farmers are exempt from submitting applications to DEM for activities that relate to normal farming activities as well as maintenance work, such as work performed on an existing farm road, an existing farm drainage structure and activities that minimize adverse effects to wetlands. *Id*. at 119, 120. A landowner who has obtained the "farmer" designation qualifies for the farm exemption and may make insignificant alterations to wetlands without obtaining a permit. However, to qualify for such exemption, the landowner must meet the statutory definition of "farmer." Otherwise, the landowner cannot claim the exemption and must receive a permit before engaging in such activities. *Id.* Some activities, such as construction of a new farm road, require a permit regardless of whether the landowner has obtained a "farmer" designation. *Id.* at 123. Mr. Ayars opined that North American's activities went "above and beyond" the type of maintenance activities encompassed under the "farmer" exemption. *Id.* at 124.

DEM further presented testimony from David E. Chopy, the Administrator of the Compliance Office with DEM, who authored the NOV and calculated the penalty assessed against

North American. *Id.* at 99. Mr. Chopy based his findings as to the nature and scope of the violations on the inspection and report of Ms. Smith. He testified that he calculated the administrative penalty consistent with his regular practice. He considered the type of violation committed and whether the deviation was major, moderate or minor. Mr. Chopy identified five categories of unauthorized alterations, those that involved: (1) constructing the first road; (2) constructing the second road; (3) altering the river, Rush Brook; (4) altering almost an acre of wetlands; and (5) altering the perimeter wetlands.

In accordance with § 2-1-23, each violation carries with it a maximum penalty of five thousand dollars ($5,000), unless the violator acted knowingly or recklessly in altering the wetlands. If the violator acted knowingly or recklessly, the maximum penalty for each such major violation increases to $10,000.

Mr. Chopy testified that he found that the violations met the knowing and willful standard for exceeding a $5,000 maximum penalty for each violation "because the Respondent was aware that there were wetlands on the property and that a permit was required to alter those wetlands." *Id.* at 106, 107. He drew that inference from the fact that North American knew to apply for the 2014 Insignificant Alteration Permit. Mr. Chopy explained how he determined that the violations were major and warranted a fine at the top of the major category, the maximum $10,000 penalty per category of violation.

> "I looked at how long it had been going on for, 8 months from when we became aware of it . . . there was no restoration there, and so that bumped it up to major, and then I looked at factor 7, whether somebody had taken reasonable appropriate steps to prevent or mitigate it, determined that the Respondent didn't take any reasonable or appropriate steps to prevent it, he didn't apply for a permit, and they didn't do anything to mitigate it even after we told them that there was violations out there, so that bumped it up to $7,500, and then when I looked at Factor 10, which is how many penalties – how many separate and distinct violations there could

> have been, there were at least 15 separate and distinct violations, and we could have assessed $10,000 for each of them, so I felt that that warranted at least going up to the top of the major, which got it up to $10,000." *Id*. at 108.

He testified that he applied the same logic to each category of violations. *Id.* at 109. He assessed $10,000.00 for each category of violation, for a total assessment of $50,000. *Id.* at 107-110.

The witnesses presented by DEM testified that North American's alterations to the freshwater wetlands went beyond those that a "farmer" may perform without permit. However, it remains unclear as to which, if any, of the alterations would have been exempt from the permit requirement if North American had obtained the "farmer" designation. In fact, Ms. Smith acknowledged she was unable to opine as to whether the violations she observed would constitute violations had North American received a "farmer" designation. *Id.* at 52. Additionally, none of the DEM witnesses offered any explanation as to why DEM failed to meet the statutory mandate to adopt rules and regulations following the 2015 amendment to the Act.

North American presented one witness, John Primeau, the president of the non-profit organization. Mr. Primeau explained that the products of the farming activities would be donated to churches, soup kitchens, dispensaries and food pantries. *Id.* at 135, 136.

He testified that prior to obtaining the "farmer" designation, North American complied with the terms of the 2014 permit it had received from DEM in 2014. *Id.* at 138. He denied constructing any new roads on the property. *Id.* He testified that he merely followed an existing path and did not construct a new road. He denied stopping the flow or changing the path of any brook or river on the property. *Id.* He explained that he had to address problems with rotted logs and did so by merely laying down cement slabs, so he could walk on them to conduct farming activities. *Id.* at 139.

On cross-examination, counsel for DEM confronted Mr. Primeau with Exhibits 4(a) and 4(b) which described the areas where alterations to the freshwater wetlands were made. Mr. Primeau described minor alterations to wetlands outside the 2014 permit rather than those characterized by DEM as extensive, major alterations. *Id.* at 148-157.

Following the completion of the testimony, Mr. Kerins, the hearing officer, granted DEM's motion for him to view the property. He did so on May 7, 2019. The parties filed post-hearing memoranda, and thereafter, on December 4, 2019, Mr. Kerins issued a 16-page decision upholding the NOV in its entirety. (Decision.)

In the Decision, the hearing officer commented on the testimony of each witness. (Decision at 2-9.) The Decision focused largely on the testimony of Ms. Smith, whom the hearing officer found to be a credible and compelling witness. *Id*. at 2-4, 11. The hearing officer concluded that DEM presented a professional and comprehensive case consisting of credible testimony buttressed by exhibits that demonstrated the extent of the disturbance to the freshwater wetlands. *Id*. The hearing officer rejected North American's argument that it was entitled to disturb the wetlands while working toward a "farmer" designation *Id*. He found that the "farmer" designation is not available until the designation has been achieved. *Id*. He remarked that Mr. Primeau's testimony about pre-existing roads and paths on the property was difficult to follow and that his testimony was "confusing and incredible." *Id*. at 9, 11. The hearing officer rejected the argument by North American that the $50,000 penalty assessed by Mr. Chopy was excessive and based upon impermissible hearsay. He found the penalty to be both fair and appropriate. *Id*. at 12, 14. The hearing officer rejected North American's argument that Mr. Chopy's testimony was based on hearsay and noted that hearsay is acceptable at an administrative hearing. *Id*. at 12.

The hearing officer found that "DEM proved by a preponderance of the evidence that freshwater wetlands on the Property were altered in violation of R.I. Gen. Laws. § 2-1-21 and Rule 5.01 of the Wetland Regulations as alleged in the Notice of Violation dated July 11, 2018." *Id*. at 15. He concluded that North American violated the Freshwater Wetlands Act as alleged in the NOV. *Id*. He found that North American "engaged in actions which significantly altered or disturbed the freshwater wetlands on the subject premises in a significant way prior to the acquisition of the 'farmer' status." *Id.* at 11. The hearing officer sustained all of the terms of the NOV issued on July 11, 2018 and denied and dismissed North American's appeal. *Id*. at 15.

North American appealed to the Superior Court from that Decision. After submitting their briefs in this case, both parties requested oral argument.[2] *See* G.L. 1956 § 42-35-15(f). The Court granted the request, and the parties appeared for remote hearing before the Court on December 1, 2020.

II

Standard of Review

This Court exercises jurisdiction over appeals from administrative agencies such as DEM pursuant to the Administrative Procedures Act (APA). Section 42-35-15. "Any person . . . who has exhausted all administrative remedies available to him or her within the agency, and who is aggrieved by a final order in a contested case is entitled to judicial review." Section 42-35-15(a). When reviewing an agency decision, this Court has the authority to

> "affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial

[2] "(f) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs." Section 42-35-15(f).

> rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> "(1) In violation of constitutional or statutory provisions;
> " (2) In excess of the statutory authority of the agency;
> "(3) Made upon unlawful procedure;
> "(4) Affected by other error of law;
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> " (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Section 42-35-15(g).

"The trial justice must not 'substitute [his or her] judgment for that of the agency as to the weight of the evidence on questions of fact.'" *Endoscopy Associates, Inc. v. Rhode Island Department of Health*, 183 A.3d 528, 532 (R.I. 2018) (quoting *Interstate Navigation Co. v. Division of Public Utilities and Carriers*, 824 A.2d 1282, 1286 (R.I. 2003)). This Court defers to the agency's factual determinations made in an administrative proceeding when there is legally competent evidence to support such findings. *Arnold v. Rhode Island Department of Labor & Training Board of Review*, 822 A.2d 164, 167 (R.I. 2003). "Legally competent evidence is 'relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means an amount more than a scintilla but less than a preponderance.'" *Id.* (quoting *Rhode Island Temps, Inc. v. Department of Labor & Training, Board of Review*, 749 A.2d 1121, 1125 (R.I. 2000)). The Court does not have discretion to determine whether an agency chose the appropriate sanction; it only decides whether the agency's findings are supported by legally competent evidence. *Rocha v. State Public Utilities Commission*, 694 A.2d 722, 726 (R.I. 1997). However, "an administrative decision can be vacated if it is clearly erroneous in view of the reliable, probative, and substantial evidence contained in the whole record." *Auto Body Association of Rhode Island v. State Department of Business Regulation*, 996 A.2d 91, 95 (R.I. 2010).

III

Analysis

In his decision, the hearing officer upheld all of the terms of the NOV and found that North American had violated R.I. Gen. Laws § 2-1-21 and DEM's Freshwater Wetland Regulations, Rule 5.01.[3]

In pertinent part, § 2-1-21, as amended in 2015, provides:

> "a)(1) No . . . nonprofit agency, or other individual or group may:
> "(i) Excavate; drain; fill; place trash, garbage, sewage, highway runoff, drainage ditch effluents, earth, rock, borrow, gravel, sand, clay, peat, or other materials or effluents upon; divert water flows into or out of; dike; dam; divert; change; add to or take from or otherwise alter the character of any freshwater wetland, buffer, or floodplain as defined in § 2-1-20 without first obtaining the approval of the director of the department of environmental management; or
> "(ii) Undertake any activity within a jurisdictional area, as defined in § 2-1-20, that may alter the character of the freshwater wetland, buffer, or floodplain without first obtaining the approval of the director of the department of environmental management. . . ." Section 2-1-21.

North American argues the Decision should be reversed because: (1) the hearing officer erred in failing to apply the "farmer" designation to North American; (2) the finding that North American violated the Act was not supported by substantial evidence in the record; (3) DEM failed to adopt regulations as required by the 2015 amendment to the Act; (4) the order lacks legal basis to require North American to restore the property; and (5) the $50,000 penalty is improper and excessive.

[3] The Freshwater Wetland Regulations were adopted before the 2015 amendment to § 2-1-21 and have not been updated as mandated by the General Assembly.

A

Farmer Designation

North American argues that DEM erred in disregarding North American's "farmer" designation when determining violations. Under the Freshwater Wetlands Act, no landowner can alter freshwater wetlands without a permit unless that landowner has been designated as a "farmer" by DEM. Those who have received a "farmer" designation can make "insignificant alterations" to conduct "normal farming activities" without having to obtain a permit to do so. Section 2-1-22(i). The Act defines "normal farming" activities. Section 2-1-22(i)(1) and (2). It describes the requirements a landowner must meet to obtain the "farmer" designation in § 2-1-22(j).

North American fails to provide a legal basis for applying "farmer" designation retroactively. The Act is clear and unambiguous. It details the criteria for obtaining a "farmer" designation. North American supported its application for the designation by submitting Farming Production Benefaction Receipts covering four calendar years, ending on November 14, 2017. (AAD Hr'g Tr. 66; DEM's Ex. E.) North American would not have qualified to receive the "farmer" designation until after November 14, 2017. Based upon its own submissions to DEM, the violations were discovered four months before North American could have applied for the "farmer" designation.

Additionally, the hearing officer accepted the testimony of the witnesses presented by DEM that even with "farmer" designation, alterations performed by North American would have required a permit. Mr. Cook, the Principal Environmental Scientist with DEM's Division of Agriculture, testified that the exemption in the Freshwater Wetlands Act allows "farmers" to make certain alterations to wetlands without a permit; however, even they would be required to obtain a permit to build new farm roads within a wetland. There was substantial record evidence that North

American altered a river and filled a wetland—two activities which are not permitted without a permit according to § 2-1-22. Based upon Ms. Smith's testimony, the alterations to the freshwater wetlands were very extensive and included construction of roads, disturbances to swamps, stream crossings and a river. The hearing officer did not err in determining that North American did not qualify for the "farmer" designation when it altered the freshwater wetlands. Likewise, the record supports a finding that certain of North American's alterations to freshwater wetlands would have required a permit regardless of whether it had received a "farmer" designation before commencing the work.

North American had no authority to perform any alterations to freshwater wetlands without a permit. With the exception of the alterations made pursuant to the 2014 Insignificant Alteration Permit, all other alterations constitute violations of the Act.

B

Evidence of Violations

There was substantial evidence on the record to support the hearing officer's decision to uphold each statutory violation listed in the NOV. The hearing officer specifically assessed Ms. Smith's testimony as reliable and credible. He rejected the testimony of John Primeau as confusing and incredible. He found that the alterations of the freshwater wetlands were significant and in clear violation of the Act. As our Supreme Court has stated, the Superior Court "must not substitute its judgment for that of the agency in regard to the credibility of the witnesses or the weight of the evidence concerning questions of fact." *Costa v. Registrar of Motor Vehicles*, 543 A.2d 1307, 1309 (R.I. 1988). The record supports the hearing officer's credibility findings. DEM presented several witnesses, including Ms. Smith, all with years of experience in the area of freshwater wetlands.

Their testimony was clear, concise and reasonable. The exhibits offered at the hearing by DEM likewise were compelling.

Ms. Smith described the violations she observed in detail and characterized them as significant disturbances covering an extensive area on the property. Based upon the evidence presented by DEM at the hearing, which the hearing officer accepted as credible, DEM proved by a fair preponderance of the evidence that North American impermissibly altered the freshwater wetlands without obtaining a permit to do so.

In her testimony, Ms. Smith referenced aerial photographs not offered in evidence as full exhibits. North American argues that reliance on those photographs constitutes impermissible hearsay. This argument fails because as the hearing officer noted in his Decision, administrative agencies generally are permitted to consider hearsay evidence in their determinations. *Craig v. Pare*, 497 A.2d 316, 320 (R.I. 1985); *see Foster-Glocester Regional School Committee v. Board of Review*, 854 A.2d 1008, 1018 (R.I. 2004). A hearing officer is trained and experienced in the matters before him or her. The importance of preventing juries from basing a verdict on unreliable or confusing testimony is less a concern when the fact-finder is a judge or a hearing officer. *DePasquale v. Harrington*, 599 A.2d 314, 316 (R.I. 1991).

Additionally, Ms. Smith testified as an expert in environmental inspections and interpretation of aerial photographs. (AAD Hr'g Tr. 13.) It is arguable that even if the hearing officer had required strict compliance with the Rules of Evidence, the testimony would have been allowed with proper foundation. "An expert's opinion may be based on . . . facts or data perceived by the expert at or before the hearing . . ." R.I. R. Evid. 703. Ms. Smith could have based her opinion, in whole or in part, on aerial photographs she viewed before or at the hearing. North

American does not challenge the authenticity of the photographs or suggest that they were altered or are otherwise without sufficient guarantees of trustworthiness to exclude her reliance on them.

North American argues that it did not receive adequate notice of what constituted a violation of the Act, particularly as it relates to the terms "Riverbank Wetland" and "Perimeter Wetland." The term "Riverbank Wetland" is not defined in the 2015 version of the Act. Additionally, there is no current regulation defining "Perimeter Wetland." In the prior version of § 2-1-20, "riverbank" was defined as:

> "that area of land within two hundred feet (200') of the edge of any flowing body of water having a width of ten feet (10') or more and that area of land within one hundred feet (100') of the edge of any flowing body of water having a width of less than ten feet (10') during normal flow." P.L. 1979, ch. 20, § 1.

The previous DEM regulation describes "Perimeter wetland" as:

> "a freshwater wetland consisting of the area of land within fifty feet (50') of the edge of any freshwater wetland consisting in part, or in whole, of a bog, marsh, swamp or pond, as defined by these Rules. For purposes of identification, this area shall be measured horizontally, without regard for topography, from the edge of such a wetland." 650-RICR-20-00-2.4 (formerly § 4.00).

Although these terms are not referenced in the Act, the definitions are included under the category "jurisdictional area." Section 2-1-20. The descriptions contained therein provide adequate notice to North American that it proceeded to alter freshwater wetlands without authority to do so. For this reason, the Court rejects North American's contention that it did not receive adequate notice.

The Act is clear. Unless a landowner has received a "farmer" designation, that landowner cannot alter freshwater wetlands at all without obtaining a permit to do so. *See* § 2-1-22. In this case, North American did not have "farmer" designation nor did it apply for permits before altering freshwater wetlands on its property. DEM offered sufficient evidence, which the hearing officer accepted as credible, to prove that North American violated the provision of the Act. To that extent,

the Decision upholding the NOV is based upon reliable, probative, and substantial evidence on the whole record.

C

DEM's Failure to Adopt Regulations

Next, North American argues that the Decision should be reversed because DEM failed to promulgate regulations to accompany the 2015 amendment to the Act. The so-called Freshwater Wetlands Act was amended effective July 10, 2015. *See* §§ 2-1-18 − § 2-1-24; §§ 2-1-20.1 − § 2-1-20.3. As set forth in § 2-1-18, the intent of the Act, in pertinent part, is "to preserve freshwater wetlands, buffers, and floodplains and regulate the use thereof freshwater through the establishment of jurisdictional areas and the regulation of activities consistent with this chapter." Section 2-1-18. The Act defines "freshwater wetlands" in detail. *See* § 2-1-20. However, the General Assembly deemed it necessary to require the Director of DEM to "adopt, modify, or repeal rules and regulations that are in accord with the purposes of §§ 2-1-18 − 2-1-27 and are subject to the administrative procedures act, chapter 35 of title 42 . . ." Section 2-1-20.1. The 2015 amendment to § 2-1-20.1 mandated the Director to adopt regulations within 12 months of the enactment. DEM failed to do so, and the Legislature extended the compliance date to 18 months.[4] DEM failed to comply with this legislative mandate.

It appears that the NOV and Decision referenced DEM regulations that had been adopted to comply with the mandate set forth in previous versions of the statute, not in the 2015 amendment. Of note, § 2-1-22(k), which provides the definition of "freshwater wetlands," was not

[4] In its brief, North American erroneously states that the applicable statute includes the 12-month time limit. (North American's Br. at 5.) However, § 2-1-20.1 was amended on July 2, 2016 to extend the compliance date by an additional 6 months. *See* ch. 218, § 1, P.L. 2016; *see also* ch. 306, § 1; P.L. 2016, ch. 321, § 1.

included in the Act prior to 2015 and thus not encompassed under the regulations referenced by the NOV or the Decision. It is on this basis that North American alleges error.

At the DEM hearing, Mr. Cook acknowledged that DEM had not promulgated post-2015 regulations and candidly admitted that he could not apply "regulations that were written for a previous version of law to enforce a law to which it doesn't refer." *Id.* at 87. DEM appears unapologetic for this failing to promulgate the required regulations and dismisses North American's argument that the lack of compliance with the statute has any relevance to the instant case.

Nevertheless, although DEM failed to adopt regulations to provide guidance as to what "constitutes a normal farming activity or involves the best farm management practices . . ." § 2-1-22(i)(3), that failure is not relevant to a determination of whether North American violated the Act; North American did not qualify for any exemptions based upon "farmer" designation when it altered the freshwater wetlands without a permit. The Court notes that North American began altering the freshwater wetlands in 2016, long before the statutory time limit passed for promulgating rules and regulations.

Further, the lack of current rules and regulations would not excuse the flagrant violation of the statutory scheme or permit a landowner to run roughshod over environmental protections. Ms. Smith testified that the alterations were extensive, covering a large area on the property and constituted major disturbances to freshwater wetlands. The hearing officer accepted her testimony and description of the unauthorized alterations.

Nonetheless, the failure of DEM to adopt required regulations does impact the restoration order and the penalty assessed. This Court urges DEM to comply with the legislative mandate and adopt the regulations that are long overdue.

D

Restoration Order

North American next contests the order requiring it to restore the wetlands to its original state. *See* § 2-1-24. The July 11, 2018 NOV sets forth nine areas where restoration is required and orders that the restoration work be completed within three months (by October 15, 2018). (NOV at 3-7, ¶ E(2)(a)-(j)). The NOV further orders North American to "[c]ontact the DEM prior to the commencement of restoration to ensure proper supervision and to obtain required restoration details. No work shall commence until such time that [North American has] met in the field with a DEM agent." *Id.* at 7, ¶ E(2)(k). In the Decision, the hearing officer sustained these terms of the NOV.

In its challenge to the restoration order, North American argues that the restoration requirements in the NOV were improper because DEM did not consider that North American had obtained the "farmer" designation by the time the NOV was issued. It appears that some of the alterations made by North American may have been allowed without a permit by someone who had a "farmer" designation. Although those alterations were unauthorized and violated the freshwater wetlands protections when made, it would serve no purpose to require North American to take necessary steps to restore any part of property that North American as a "farmer" now could alter without a permit. To the limited extent that North American made alterations to wetlands that were consistent with normal farming activities as set forth in § 2-1-22(i)(1), it would achieve an absurd result to require North American to restore the property when after doing so, North American merely could make the same alterations again without a permit. *See Matter of Falstaff Brewing Corp. re: Narragansett Brewery Fire,* 637 A.2d 1047, 1050 (R.I. 1994) (It is well established that the Court must not construe a "statute . . . in a way that would result in 'absurdities

or would defeat the underlying purpose of the enactment."'*); see also O'Connell v. Walmsley*, 156 A.3d 422, 428 (R.I. 2017); *Commercial Union Insurance Co. v. Pelchat*, 727 A.2d 676, 681 (R.I. 1999).

Counsel for DEM dismisses this issue by suggesting that in accordance with the NOV, before beginning the restoration work North American must meet in the field with a DEM agent to review the restoration details. (NOV at 7, ¶ E(2)(k).) She concludes that such meeting provides North American with "an avenue to address [its] concerns regarding the restoration requirements vis-à-vis [North American's] "farmer" status . . ." (DEM's Br. at 25.) The Court rejects this argument as inconsistent with the clear and unambiguous terms of the NOV which requires North American to "[r]estore all freshwater wetlands" *Id.* at 3-7, ¶ E(2)(a)-(j). Nothing contained therein suggests that a field agent would have the authority or inclination to modify that provision.

There is nothing in the NOV or the Decision that suggests the restoration order takes North American's current "farmer" designation into consideration. Neither the NOV nor the Decision limits the restoration requirements to those alterations that could not have been made by a landowner who had a "farmer" designation. As such, the restoration order in the NOV and Decision is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

North American also challenges the restoration order based on the absence of post-2015 regulations. Indeed, the regulations are necessary to determine what "constitutes a normal farming activity, or involves the best farm management practices. . . ." Section 2-1-22(i)(3).[5] Although the

[5] It also impacts the penalty DEM imposed against North American to the extent that Mr. Chopy increased the assessment based upon North American's failure to restore the wetlands after receiving notice from DEM that it had violated the Act.

absence of such regulations has no bearing on the issue of violation, as discussed *supra*, DEM's failure to adopt regulations mandated by § 2-1-22 (i)(3) or subdivision (i)(2) is significant on the issue of restoration. Specifically, the lack of up-to-date regulations creates uncertainty as to whether certain activities are normal farming activities or involve the best farm management. Under such circumstances, it would be arbitrary and capricious to require North American to accept DEM's mere speculation as to what such regulations would require if enacted.

Accordingly, the hearing officer erred in upholding the terms of the NOV as it pertained to the restoration order. The Decision is modified to the extent that it requires: (1) North American to restore any alterations it made to freshwater wetlands that it now could accomplish without a permit due to its "farmer" designation; and (2) North American to meet in the field with a DEM agent to "obtain required restoration details" before DEM adopts the mandated regulations. (NOV at 7, ¶ E(2)(k).) The obligation to meet in the field with a DEM agent and to commence restoration of the wetlands is stayed until DEM adopts the regulations. The restoration shall be completed within three months thereafter, the time frame referenced in the NOV.

E

Penalty

North American's final challenge is to the imposition of the $50,000 penalty. First, North American contests the penalty on the ground that it was based on hearsay. Second, North American argues that there was insufficient evidence to establish that its violations were knowing or willful. Lastly, North American argues that the penalty was excessive.

The penalty was imposed pursuant to § 2-1-23:

> "In the event of a violation of § 2-1-21, . . . [t]he violator is liable for a fine not exceeding five thousand dollars ($5,000) for each violation, except that if the violator knowingly or recklessly alters a freshwater wetland, buffer, floodplain or other jurisdictional area

> without a permit or approval from the director; *knowingly or recklessly* alters a freshwater wetland, buffer, floodplain or other jurisdictional area in violation of the rules or regulations promulgated by the director; or alters a freshwater wetland, buffer, floodplain or other jurisdictional area in violation of a permit issued by the director, then the violator is liable for a fine not exceeding ten thousand dollars ($10,000) for each violation." (Emphasis added.) Section 2-1-23.

The rules and procedures for assessing administrative penalties is addressed in 250-RICR-130-00-1.12 which provides:

> "C. In an enforcement hearing the Director must prove the alleged violation by a preponderance of the evidence. Once a violation is established, the violator bears the burden of proving by a preponderance of the evidence that the Director failed to assess the penalty and/or the economic benefit portion of the penalty in accordance with [the] regulations." 250-RICR-130-00-1.12.[6]

Here, the hearing officer upheld the $50,000 fine imposed in the NOV on the basis of the testimony of Mr. Chopy who had relied on Ms. Smith's report in determining the nature and extent of the alterations. North American first challenges the hearing officer's assessment in part by arguing that Mr. Chopy's opinions were based upon hearsay.[7] Again, hearsay evidence is permitted at an administrative hearing. *See Craig*, 497 A.2d at 320; *see also Foster-Glocester Regional School Committee*, 854 A.2d at 1018 .

In support of its argument that there is no evidence of willfulness, North American relies on Mr. Primeau's statements to Charles A. Horbert when he inspected the property and discovered the violations on July 26, 2017. Mr. Primeau told Mr. Horbert that the lawyer for North American

[6] DEM did not assess a penalty based upon economic benefit. (AAD Hr'g Tr. 105.)

[7] Of significance, this Court notes that North American did not object to Mr. Chopy's testimony as hearsay at the administrative hearing. An evidentiary issue that has not been raised and articulated at a hearing or trial is not properly preserved for appeal. *See State v. Gomez*, 848 A.2d 221, 237 (R.I. 2004) *see also State v. Figuereo*, 31 A.3d 1283, 1289 (R.I. 2011); *DeMarco v. Travelers Insurance Co.*, 26 A.3d 585, 628 n.55 (R.I. 2011).

told him that no permit was required because it had qualified by the USDA as a "farmer." He also told Mr. Horbert that the lawyer had sent a letter to the Director of DEM notifying her of North American's intention to farm the property. (Horbert Site Inspection Report, DEM's Ex. 2.) The hearing officer found Mr. Primeau lacked credibility. As such, it follows that the hearing officer rejected these self-serving statements and further found that Mr. Primeau had no basis for relying on the USDA "farmer" classification when altering the wetlands without a permit. Consistent with the standard of review, the Court must accept the credibility findings of the hearing officer.

Mr. Chopy explained the basis of his conclusion that North American had acted willfully when it violated the Act and altered the freshwater wetlands. He drew the inference that the 2014 application submitted by North American for an Insignificant Alteration Permit demonstrated awareness that there were wetlands on the property and that a permit was required to alter them. The hearing officer accepted his reasoning as credible. This Court cannot conclude that Mr. Chopy's determination of willfulness was clearly erroneous or that the hearing justice erred in accepting it.

Finally, North American contends that the $50,000 penalty was excessive. DEM counters by arguing that once DEM proved the violations, the burden shifted to North American to prove that the penalty was improperly assessed or excessive and North American failed to do so. The hearing officer did not shift the burden of proof when deciding that the penalty was reasonable. In fact, he specifically stated: "In an appeal of a Notice of Violation the burden of proof is on the Department to prove by a preponderance of the evidence. that the Notice of Violation was proper." (Decision at 10.) DEM did not raise the burden-shifting issue during the hearing. *See Gomez,* 848 A.2d at 237; *see also Figuereo,* 31 A.3d at 1289; *DeMarco,* 26 A.3d at 628 n.55. The Court will

not apply a burden-shifting analysis in determining North American's claim that the penalty was excessive.[8]

After determining that the maximum allowable penalty was $10,000 per violation, Mr. Chopy considered a series of factors before deciding to impose the maximum penalty for each category of violation. Those factors focused in significant part on the failure of North American to restore the wetlands or take appropriate steps to restore the wetlands and mitigate the damage after DEM first notified it in August 2017 that the wetlands had been altered in violation of the Act. In fact, Mr. Chopy testified that North American's failure to restore the wetlands prompted him to "bump it up" from a minor or moderate deviation to a major one and then to "bump it up" further to $7,500 (AAD Hr'g Tr. 108.) Finally, he increased it again to $10,000 after considering the sheer number of separate and distinct violations. *Id.*

However, as discussed *supra*, the NOV makes no distinction between those alterations that would be allowed without a permit if the landowner had "farmer" designation from those that would have required a permit even with that designation. Additionally, DEM has not adopted pertinent regulations required by the 2015 amendment to the Act. To the extent that the penalty was increased because the landowner failed to restore the wetlands, that penalty is excessive. As such, it was based upon unlawful procedure and was clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. The imposition of an excessive penalty prejudices substantial rights of North American. This Court reverses the penalty and remands the penalty order back to DEM to be reassessed consistent with this Decision, to wit, without regard

[8] Even if the Court had applied the two-step analysis in deciding whether the penalty was excessive, the result would be the same.

to the failure of North American to restore the wetlands or mitigate the damage before the NOV was issued.

IV

Conclusion

The Court affirms the hearing officer's Decision that North American violated the Freshwater Wetlands Act by making alterations to freshwater wetlands without permits; the Decision upholding the NOV on the finding of violations was based upon the reliable, probative and substantial evidence on the whole record.

The restoration order in the NOV and Decision upholding the NOV is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. The Court modifies the restoration order as follows: (1) North American shall restore the freshwater wetlands that it could not have altered without permits if it had obtained the "farmer" designation before making the alterations; (2) North American need not restore freshwater wetlands that it could have altered without obtaining permits if it had received "farmer" designation before making the alterations; (3) The restoration order is stayed until DEM adopts the regulations referred to in the 2015 amendment to the Act, and in particular, in § 2-1-22(i)(3). Thereafter, North American shall meet with DEM in the field to review the restoration requirements. North American shall complete all required restoration work within three months following the adoption by DEM of the statutorily required regulations.

The Court reverses the Decision upholding the NOV as to the assessment of a $50,000 penalty and remands the case back to DEM to reassess the penalty consistent with this Decision. The imposition of a $50,000 penalty based in part on the failure of North American to commence or complete restoring the wetlands was excessive, clearly erroneous in view of the reliable,

probative, and substantial evidence on the whole record and prejudices substantial rights of North American.

Counsel shall submit an appropriate order consistent with this Decision.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	North American Catholic Educational Programming Foundation, Inc. v. Department of Environmental Management, et al.
CASE NO:	PC-2019-11876
COURT:	Providence County Superior Court
DATE DECISION FILED:	February 12, 2021
JUSTICE/MAGISTRATE:	Vogel, J.
ATTORNEYS:	
For Plaintiff:	Peter J. Petrarca, Esq.; Jina N. Petrarca, Esq.
For Defendant:	Christina Anne Hoefsmit, Esq.